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## Donations obtained by misrepresentation

Posted on [August 1, 2013](#) by [mhogg](#)

An interesting letter published in a recent edition of the New York Times was brought to my attention:

“I’m on the art-museum board, so that is my preferred artistic donee. An acquaintance repeatedly called me for a donation to the opera. I don’t like opera. I said he should donate to the art museum. He said he’d give to the museum whatever I gave to the opera. We agreed on \$10,000 apiece. He called the next four years and offered to make the same deal. I accepted each year. As I was looking through our donor list for unrelated reasons, I discovered he has been giving only \$1,000 a year. I sent him an e-mail telling him of my discovery, and he responded, “Nailed me.” As if it were funny. What is my ethical response? Demand my excess back from the opera? Threaten to sue him if he doesn’t pony up to the museum? Gossip? T.S., LOCATION WITHHELD”

The author of the letter asks what the ethical response would be, but the facts make interesting ones when considering any possible legal remedies. What follows are some observations on whether, under Scots law, any remedy would be available to ‘T.S.’ – let’s call T.S. ‘A’ for ease of reference, and his (or her) friend ‘B’, the opera company to which A donated, ‘C’, and the museum to which B donated ‘D’. I am assuming for present purposes that C knew nothing of B’s deception (the letter gives no suggestion of any such knowledge on C’s part); complicity by C in B’s fraud would likely render it liable to repayment, based on the rule applicable in Scots law against profiting from another’s fraud. Any comments on my preliminary thoughts on this problem would be welcome.

Does A have any remedy against B? One could argue that A and B stand in a contractual relationship towards each other: their precise relationship would arguably be constituted by consecutive, discrete contracts in each of the five years in question, each of the parties having annually contracted to make matching donations of a stipulated amount to a stipulated recipient. There is certainly sufficient agreement on the essential terms of a contract. The only objection might be that, while such agreement existed, there was a lack of contractual intent: all that there was, it might be said, was an understanding, binding in honour only, between the two. On the other hand, there is a reasonably substantial pecuniary element to this arrangement, and third parties are intended to benefit under it, so a court might well feel that these arrangements were sufficiently serious to demonstrate contractual intent.

If the relationship is contractual, however, each of the contracts appears to have been formed as a result of B misrepresenting (probably fraudulently) his intentions; furthermore B appears to have breached each contract by failing to make the full payment agreed. A misrepresentation inducing a contract is actionable in delict, and a breach of contract in, of course, contract itself. (If there is no contract between the parties, then A might still seek to make a claim in delict unrelated to any alleged contract which flowed from the misrepresentation: the misrepresentation, made directly by B to A has still caused the losses discussed further below, and although these are pure economic losses the relationship of the parties seem sufficiently proximate to justify a claim in delict.)

A subsidiary contractual question also arises: if the annual undertakings to make the donations are indeed contractual in nature, could one also argue that, under Scots law, the two stipulated recipients (the opera company and the art gallery) are third party beneficiaries deriving a *jus quaesitum tertio* from such contracts? There is certainly an intention on the part of the contracting parties to benefit the third parties in question, but the stumbling block (post the Carmichael case) would appear to be that there is no delivery of the contract, or any equivalent (e.g. informing the intended recipients about the arrangement), and without this there can be no

concluded third party rights. So, D would have no direct claim to enforce B's undertakings in contract.

In respect of both B's misrepresentation to A and B's breach of contract, damages are A's obvious remedy, in the misrepresentation case damages designed to put A in to the position he would have been in had the misrepresentation not occurred. In assessing A's counterfactual position, a court would imagine circumstances where B had made an accurate representation, i.e. where he had represented that he would give the amount which he in fact gave, i.e. £1,000 (we shall call it pounds, not dollars), rather than £10,000. Had that been the representation made by B, then A would only have pledged to match such an amount with a £1,000 donation (£9,000 less than what he in fact gave). An award of £9,000 per annum for each of the five years would thus be the measure of A's losses flowing from the misrepresentation, i.e. £45,000 in total over the five years in question (this would be so whether or not A and B were in a contractual relationship).

In a breach of contract case, damages would be designed to put A in to the same position he would have been in had B performed his obligations: had B in fact paid £10,000 per annum, A would still have done exactly as he did, i.e. he would still have given £10,000 per annum to the opera company. So A is no worse off as a result of B's breach of contract, and no contractual damages are due to him, something which clearly makes a contractual claim less desirable to A than a delictual one.

Turning the focus away from a possible claim against B, might there alternatively be a way for A to reclaim the sums paid by him directly from C either in unjustified enrichment or in donation? In unjustified enrichment, the factual circumstances seem to match up most closely with the *condictio causa data causa non secuta*, the claim for something given for a cause (i.e. reason) which does not transpire. A's argument would be that his transfers of funds to the opera company were made in order to secure a matched donation to the art gallery: this was the *causa* of A's donation. Such *causa* did not follow – *causa non secuta* – B not making the matching donations, so A's transfers to the opera company failed to secure the purpose for which they were made. However, A seems to have made these donations without disclosing his reasons for so doing to the recipient, C. That is a somewhat unusual case, as the question of whether or not a *causa* has been disclosed to the recipient of a transfer usually only arises in relation to two party cases, whereas in this case A has agreed with B to make a conditional transfer to C. Nonetheless, just as in two party cases any *causa* must, to be relevant, be express or able to be reasonably implied from the circumstances of the transfer, so I would argue it must be in the case of a transfer to a third party: if such a transfer was made by A to C without disclosing the *causa* for which it was made, A should not be able to make a claim based upon the *condictio causa data* against C (the same reasoning would apply in any claim based upon the law of donation: an undisclosed condition cannot found a claim that the donation was conditional and that the condition was unfulfilled). Even without this fundamental objection to an unjustified enrichment claim by A, C would be able to plead the defence to an enrichment claim of 'change of position': the money donated will likely have been spent by the opera company.

So, at first glance, the problem disclosed in the above letter would, under Scots law, seem to afford A with a damages claim in delict against B, but no claim against C.

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